

The Institutionalization of  
Black Labor Market Discrimination  
and the Development of  
Anti-Discrimination Laws in the United States

An Honors Thesis (ID 499)

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## INTRODUCTION

The purpose of this paper is to demonstrate how the inferior status of blacks in the U. S. labor market is the result of important social and economic forces of the past and to show how their labor market status has become institutionalized over time.

The social and economic institutions that led to the inferior labor market status of blacks are: the institution of slavery, practices of labor unions, and practices of management. Each of these contributed to placing blacks in an inferior market position. By the 1930s this status had become institutionalized.

After the Depression changes began to take place within society. No longer was laissez-faire economics so readily accepted and limitations were beginning to be placed on the actions of employers and labor unions. Although the laws which were passed at this time did not deal directly with discrimination, the development of the court's interpretation of the laws did deal with it.

It will be shown that the institutionalized effects of past discrimination can only be overcome through a strong national commitment to "anti-discrimination" legislation. The development of this legislation reached its peak in the 1960s with the enactment of the Civil Rights Act of 1964 which prohibits discrimination on the basis of "sex, race, color, creed, or national origin." Title VII of this act specifically deals with "equal employment opportunity" for all. Executive

Order 11246 went one step further in requiring government contractors to take "affirmative action" in getting rid of discrimination in employment.

A major conclusion of this paper is that these two laws represent the most powerful and effective means of breaking down the barriers that have barred blacks from gaining equal status in the marketplace. Continued enforcement of both is needed for blacks to achieve equal employment opportunities in the United States.

## THE INSTITUTION OF SLAVERY

The position that blacks have played in the American economy can be traced back to colonial times when they were brought to the United States from their native homes in Africa. Once here in the United States they were indentured as slaves. The institution of slavery has affected the black race more than any other institution in existence. The effects are still being felt more than one hundred years after the abolition of slavery. A brief look at the history of American slavery follows.

The popular image of blacks during slavery was to view them as field hands and as domestic servants. During the early years of American slavery, blacks were indeed brought to the United States for agricultural reasons alone. Many slave owners feared that training blacks in the crafts "would bring the slave into contact with free workers and provide access to tools needed for weapons, thus increasing the danger of insurrection." (#27, p. 316) Also the hostility of white artisans to slave competition and the belief that black men were inferior to whites all further aided in restricting blacks to agriculture service.

However, declining tobacco prices, the mainstay of the Southern economy during colonial times, forced many southerners to turn to manufacturing during the early eighteenth century. Manufacturing was independent of the weather, was more conducive to specialization and offered greater opportunity for improvement. (#27, p. 317)

Along with the decline of tobacco prices there was a shortage of skilled craftsmen who had mastered the trades. According to Stavisky, "the province of South Carolina in 1731 had only one potter; while Connecticut, the following year had not enough capmakers to manufacture one half of the hats worn by the inhabitants." (#27, p. 317) These two examples are illustrative of the shortage of skilled craftsmen that existed.

This shortage gave the established craftsmen much bargaining power. Since their services were in such demand, they were given the high wage they asked for. Added to this was the existence of vast tracts of land available for settlement in the New World. Since artisans were not content to work for an employer, they often saved their money until they were able to buy land in the country. Once they bought the land they quit their job as craftsman and moved to their own land where they would be their own boss.

Employers who could not afford the high wages and the excessive turnover turned to the black slaves as a source of labor. By training the slaves in the crafts, employers solved both of their problems, high wages and high turnover rates.

Although there was much opposition to training the slaves in the handicrafts, economic conditions (declining tobacco prices and the shortage of labor) forced many employers to hire slaves as craftsmen. Slaves were trained in a wide range of crafts from the manufacture of shoes and cloth goods as well as coopers and blacksmiths.

There was little specialization during this time. Each craftsman was responsible for the completion of his product from the initial planning to the finishing touches. Besides this, the craftsman needed to know various other crafts related to his own. For example, "the carpenter was simultaneously a cabinetmaker, wood turner, builder, coffin and pattern maker, architect, contractor, wheelwright, sawyer, and cooper." (#2, p. 322) Therefore slave artisans were not only proficient in one trade but many others as well.

Slaves were used in the wide range of skilled work which was required on the colonial plantation. An ad in the South Carolina Gazette in 1751 states, "About Fifty Valuable Slaves, among which are sundry tradesmen, such as Bricklayers, Carpenters, Coopers, Sawyers, Shoemakers, Tanners, Curriers and Boatmen." (#13, 7) Slaves also worked in the towns at manufacturing trades. A Gazette ad in the same year offered the shoemaking business of John Matthews for sale, the purchase to include slaves "who have done all my business, for nine years past, and are at least equal to any negroes of the trade in this province. . . ." (#13, p. 7) By the year 1850, more than 20 percent of the 3.2 million slaves in the South held positions other than agriculture. Those slaves skilled in the crafts "were worth considerably more money than ordinary field hands; well-trained mechanics sometimes sold for as much as \$2,000, compared to the price of \$800 to \$1000 for a strong plantation hand." (#13, p. 8)

Skilled black workers were also found in many cities. In

the Charleston, South Carolina municipal census of 1848, it showed that black workers outnumbered whites in the following occupations: bricklayers, house and ship carpenters, plasters, wharf builders and coopers. (#7, p. 311) Also in many Missouri iron furnaces several thousand slaves " were employed in the mining of iron and conducting the iron furnaces." (#13, p.10)

This brief summary shows that blacks played an important and viable role in the development of the United States. What is so peculiar is that in a country that guaranteed "freedom for all" such an institution as slavery existed. Slavery stripped the black race of every form of human dignity. They were looked upon as pieces of property and not as fellow human beings. "Blacks had no civil rights; they could not hold property nor make contracts; they could not testify in court, inherit, or even buy and sell without their masters' permission. They had no legal recourse against abuse, and their marriages had no status in law whatever." (#30, p. 141)

Under the institution of slavery blacks achieved a level of positions that required significant skills but they were not paid according to their productivity and they did not enjoy the basic "rights" in the marketplace. Blacks did make valuable contributions to the United States' growth, but without the basic right of freedom they held an inferior status in American society.

The purpose of this paper is not to discuss the events which led up to the Civil War. However, the outcome is of concern here and that outcome was the abolition of the institu-



tion of slavery. The thirteenth amendment to the United States constitution declared, "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction." (#9, p. 696) Formally the institution of slavery ended on December 13, 1865, when this amendment was ratified.

The fourteenth and fifteenth amendments carried it further by proclaiming that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" (#9, p. 696) and "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by a State on account of race, color, or previous condition of servitude." (#9, p. 697) Although the 14th Amendment provides some protection for blacks from discriminatory action by states it does not afford them protection from discriminatory action by individuals, including employers.

Even before Emancipation steps were taken to restrict blacks and these steps were continued after 1865, regardless of the law. For example, in the early 1850s the textile industry in South Carolina chose white workers over black workers in

order to maintain stability in the so called "social order." This practice was later adopted in other southern states during Reconstruction. (#13, p. 12)

The attempts that were made to exclude blacks from jobs before Emancipation were only accelerated after blacks were given their freedom. On August 5, 1866, many newly freed blacks presented a petition asking for jobs in the tobacco industry that they had previously held as slaves. They "had been engaged in the tobacco business exclusively before the war" (#5, p. 25) but since then they had been replaced by white workers.

It is interesting to note that after slavery blacks enjoyed more "rights" but they were no longer able to move into the skilled trades. After 1865, the blacks lost the support of their former masters, who had had a vested interest in seeing that they practiced their trades. After Emancipation, employers preferred to pay the same wages to white workers instead of to black workers. Therefore, blacks were crowded out of the skilled positions that they had held before Emancipation. In 1905 John R. Commons reported that few Northern plasterers unions and almost none of the carpenters, mason and painters unions accepted blacks into their membership. Finally, E. Franklin Frazier stated that blacks in the North were confined principally to domestic and personal service occupations. (#16, p. 11)

It has been shown that the Thirteenth Amendment which legally ended the institution of slavery was not accompanied

by equality. The failure to "reconstruct" the South left the newly freed blacks in a very precarious position. According to Herbert Hill, "once the emancipated black was defined as inferior in a series of court decisions and by social practice and the Federal Government did little or nothing to insure equal treatment, his economic position continued to deteriorate, thus reinforcing the notion of racial inferiority." (#13, p. 13)

The institution of slavery was one of the most important social institutions which shaped the inferior status that black worker hold in the marketplace. After slavery was abolished, it was followed by other institutions which continued and in some instances intensified the unequal treatment of blacks in the labor market. For the purpose of organization, each institution is classified under either practices of unions or practices of management. Discussion of each of these follows.

## PRACTICES OF LABOR UNIONS

By the 1880s Reconstruction had failed and urbanization and industrialization were well under way. The growth and development of the labor unions continued the racist effects of "laissez-faire" economics. Blacks continued to be excluded from many of the higher skilled jobs and forced to work in menial occupations. The strength and power that the labor unions acquired over the years played one of the major roles in barring blacks from many higher paying, higher skilled, more desirable jobs in the marketplace.

For a brief period of time after the post-Reconstruction period a few labor unions were successful in organizing both black and white workers on an egalitarian basis. A few examples of these unions were the Knights of Labor, the Brotherhood of Timber Workers, the Industrial Workers of the World, and in its early years the United Mine Workers of America. These unions soon died out and the growth of the American Federation of Labor (AFL) shifted the emphasis of unions away from racial equality to racial inequality.

The basic philosophy of the AFL was that the skilled craftsman was supreme. The main purpose of the Federation was to protect the organized worker and his craft, which was viewed as an art. Unskilled workers were not organized because it was believed that these workers would become dependent upon the skilled workers in the union. By admitting only skilled workers into the union they were able to gain its power. The source of its bargaining power was to control the supply

of labor.

At first the AFL seemed to promote racial equality. During the AFL's Tenth Annual Convention in 1890, a resolution was passed which stated that the AFL "looks with disfavor upon trade unions having provisions which exclude from membership persons on account of race or color." (#1, p. 31) Then four years later at another convention the AFL again reiterated that "working people must unite and organize irrespective of creed, color, sex, nationality or politics." (#55, p. 32) To support these statements the AFL refused to admit the National Association of Machinists in 1890 because the national constitution of this union prohibited black membership.

These events were more the exception than the rule. Soon these gave way to exclusive craft union policies that came to be associated with the AFL. The man most responsible for promoting these policies was Samuel Gompers, the first president of the American Federation of Labor. His term as president lasted almost uninterruptedly for 38 years. In 1894 he was defeated for re-election but the following year he was re-elected to the presidency, a post he held until his death in 1924. (#14, p.286)

Gompers also developed "what was to become classic labor stance on civil rights, i.e., expressing formal support for Negro equality while acquiescing in overt discriminatory practices." (#14, p. 287) Gompers once stated that "the sentiment of organized labor of the country is decidedly in favor of maintaining and encouraging the recognition of equality

between colored and white laborers." (#14, p. 287) He also wrote ". . . if the colored man continues to lend himself to the work of tearing down what the white man has built up a race hatred far worse than ever known will result. Caucasian civilization will serve notice that its uplifting process is not to be interfered with in any way." (#14, p. 287)

Black workers were driven out of competition with white workers through many methods. Restrictive racial membership clauses in many union constitutions excluded blacks from membership. For example, Article IX of the 1864 constitution of the Cigar Makers Union stated that "unless said person is a white practical cigar maker," (#13, p. 19) he could not belong to the union. The Brotherhood of Locomotive Firemen and Enginemen, an independent union, had the following membership qualification: "He shall be white, born of good moral character, sober and industrious, sound in body and limb, his eyesight shall be normal, not less than eighteen years of age, and able to read and write the English language." (#13, p. 19)

Many unions did not have specific provisions which prohibited the inclusion of blacks in union membership, but there was often an inferred agreement among unions not to include them. In a study of racial practices of labor unions in 1930, it was noted:

"The absence of constitutional clauses discriminating against Negro workers implied their admission in these unions. Tacit agreement, examinations, and local determination of eligibility for membership serve as deterrents to Negro exclusion in many unions. The Plumbers have never

made an issue of the question of admitting Negroes, though it is generally understood that they are not admitted. Despite persistent efforts of Negro plumbers in Philadelphia, New York, and Chicago to secure membership, they have not succeeded. . . In Philadelphia, the licensing board will not grant licenses to Negro plumbers." (#13, p. 19)

Other methods unions used were: separate racial lines of seniority and job assignment in union contracts; union control of licensing boards; refusal to admit nonwhites into union-controlled apprenticeship training programs; negotiating discriminatory labor agreements that affected blacks while excluding them from union membership, preventing their participation in collective bargaining; and denying blacks access to hiring halls and other job referral systems.

White labor organizations were successful in restricting black workers to the lowest jobs. C. Vann Woodward, as quoted by Herbert Hill in Race, Work and the Law, said:

"The caste system, the color line, and the new spirit of racial aggression were strongly felt in labor relations and in trade unions. Caste sanctioned a division of labor into white men's jobs and black men's jobs. Sometimes aided by an employer's policy of hiring, sometimes encouraged by politicians, white labor kept up an unremitting pressure to drive Negroes out of the better paid, more attractive work, and further down in the job hierarchy." (#13, p. 21)

At the same time that the American Federation of Labor was growing and expanding, a large number of segregated Negro locals were springing up. The AFL did not wish to admit them into the central body of their federation so in 1900, Article 12, Section 6, of the AFL constitution was revised to

read: "Separate charters may be issued to central labor unions, local unions or federated labor unions, composed exclusively of colored workers, where in the judgement of the executive council it appears advisable." (#13, p. 20)

The major purpose of creating the segregated locals was to prevent blacks from participating in the relationship that existed between labor and management. Another purpose was to prevent blacks from having any control over their position in the labor market.

In many places where the AFL wished to expand, many black labor unions existed. In order for the AFL to gain a stronghold in those places, the AFL had these black unions enter as segregated locals of the national AFL. One example of where the AFL had to do this was in the longshoremen industry in New York, Charlestown, and some southern cities. (#4, pp. 222-231)

The racial practices of the labor unions soon became accepted and the employment patterns became fixed. The unions became so effective that the black's industrial advancement was ". . . checked by the interference of labor organizations." (#4, 222-231)

In an article by John Stephens Durham that appeared in an 1898 issue of Atlantic Monthly, he described how the AFL prevented blacks from working in various occupations. He spoke of how blacks and whites had previously worked side by side in many skilled occupations until the formation of the AFL. The AFL then excluded blacks from many skilled jobs and forced them to take menial jobs. He went on to give various



examples of how blacks were denied employment as painters, carpenters, printers, and coopers because of their race due to the presence of AFL unions.

Durham came to an interesting conclusion when he stated that since blacks were forced to perform many menial tasks, the black race "has come to be associated with this kind of work, and his effort to secure the opportunity to do better is regarded with indifference or with a sense of helplessness. Thus the Negro as a group is denied the work which it is capable of doing. . . ." (#4, 231)

The idea that blacks were incapable of holding skilled jobs which required some degree of intelligence and proficiency spread quickly and most Americans accepted this view of blacks without questioning it.

The American Federation of Labor dominated the labor scene for many years. The AFL was effective in barring blacks from employment in skilled trades because it controlled the supply of labor into these trades. So effective was the AFL in excluding blacks from union membership and from entering apprenticeship training programs and from negotiating discriminatory labor agreements that blacks were effectively barred from obtaining skilled jobs.

The Department of Research and Investigations of the National Urban League published in 1930 the first authentic and comprehensive study of Negro membership in American labor unions. Included in this study was a look at the relationship between blacks and organized labor in selected U.S. cities.

This study, quoting a study by the National Urban League on "The Negro at Work in Baltimore", reported the union status of blacks there as follows:

"It is a fact that in the 'open shops' there is an almost complete exclusion of Negroes from the skilled positions and many of the semi-skilled ones for which the unions are in no sense responsible; and in practically all of the independent crafts, such as carpentry, brick masonry, plumbing and steamfitting there is almost total exclusion for which the employers are not responsible. For in the former case union organizations are not tolerated, and in the latter employers willing to use Negroes have been definitely prohibited by the unions."  
(#8, p. 139)

In Baltimore there were 114 locals affiliated with the Baltimore Federation of Labor. These locals were divided into 3 groups: the first group consisted of those crafts not employing blacks, the second group included those crafts in which blacks were employed but were not admitted into unions, and the third group consisted of those lines of work where blacks were employed and were permitted to organize separate locals.

Group one consisted of 54 unions. Of the 114 locals, 47 percent excluded blacks from employment. Group two, which excluded blacks from membership was composed of independent craft unions, carpenter, plumbers and steamfitters, printers and decorators, and mechanics. The third were the locals where blacks were able to organize. The unions included longshoremen, common laborers, musicians,

freight handlers, and federal employees. From 1923 to 1928 the total membership in these groups dropped from 1,980 to 1,476. (#8, p. 140)

Another study was taken in Los Angeles. A list of the membership of various locals in L.A. revealed that of 12 of the 23 cited, there were no Negro members. An investigation concerning this discrepancy came up with the following reasons:

Asbestos Workers - No Negroes in the trade;  
they could not stand the heat.  
Hoisting Engineers - No Negroes in the  
trade; it was too dangerous.  
Painters - There are not many skilled  
painters among Negroes.  
Teamsters and Truck Drivers - Negro  
leaders were in the pay of large  
companies and refused to let  
Negroes join.  
Iron Workers - Negroes would be taken if  
they followed the trade. (#8, pp. 142-143)

The L.A. study shows the many unfounded excuses that were given for not letting blacks join unions. These excuses were based on the prejudices of whites and not on any sound basis. It is ridiculous to think that the black race is any less resistant to heat than whites are or that they could not be employed as hoisting engineers because it was too dangerous. Clearly these examples show the devices which were taken to exclude blacks from union membership.

With the rise of the mass production industries in the early 1930s a new type of union came into prominence - the industrial union. The Congress of Industrial Organizations was the most powerful and it will be discussed here. It was originally formed in 1935 as the Committee for Industrial

Organization as a part of the AFL. After being expelled from the AFL it reorganized in 1938 and adopted the Congress of Industrial Organizations as its official name.

The CIO broke away from the traditions associated with the AFL. The basic goals and ideals of the AFL were contrary to the aims and ideals of industrial unions. The CIO was organized along vertical lines rather than along the horizontal lines of the craft unions. By controlling the supply of workers into the industry, the craft union was able to maintain its power. The CIO, on the other hand, required the inclusion of all employees in large collective bargaining as a source of plantwide unity to exert pressures on employers. The AFL gained its power by controlling and limiting the supply of labor; the CIO gained its power by unifying the total work force.

At first the founding of the CIO seemed to be the panacea for the problems that blacks faced in the marketplace. At the 1941 Convention of the CIO the following resolution was adopted:

"Resolved, that the CIO reaffirms the position which it has consistently maintained from the beginning in opposition to any and all forms of discrimination between one worker and another based upon considerations of race, creed, color, or nationality. . . and that the CIO condemns the policies of many employers of discriminating in their hiring and other employment conditions against Negroes. . . (#14, p. 188)

Soon it was discovered that the CIO was not the cure-all that it was once thought to be. Instead the forms of racial

discrimination had merely changed. It was true that industrial unions did organized black workers into the collective bargaining unit. The industrial unions realized that to be successful they had to be strong in numbers. Since blacks were concentrated in these non-skilled industries, such as steel and auto, the union leaders realized that black support was necessary. Once blacks were members of the union they faced many new forms of discrimination which they had not encountered in the past.

One form of discrimination that blacks faced was in regard to union leadership. Blacks were almost always barred from actively holding any office in the union hierarchy which had any type of power associated with it. Blacks were forced to remain in the "general" membership. Often times, the grievance procedure which was set up to hear employee complaints virtually ignored the complaints of blacks and failed to process their grievances.

In many union contracts agreements based on race were included. Job assignment, promotion, furlough, and dismissal were often times based on race. Separate lines of promotion each based on race were adopted. Therefore in a single company there were two different lines of promotion - one for whites and another for blacks. Since black workers have traditionally been crowded into the less desirable, lower paying jobs their chances of getting ahead were limited by these segregated promotional lines. It is interesting to note how these departmental seniority systems perpetuated this

segregation over time.

A typical example of the type of discrimination that black industrial workers faced occurred at a coke plant of the Carnegie-Illinois Steel Corporation in Clairton, Pennsylvania on February 25, 1944. Black workmen on the midnight shift refused to work and a stoppage followed. To understand why the black workers refused to work it is necessary to have the following background: Prior to 1933 the entire coke force was black. After 1933 management began to hire white workers who were then taught the job by the blacks. As soon as the white workers learned the jobs, the black workers were transferred to other departments and given jobs of a lower classification.

This continued until the 1940s. The blacks realized that the only way to regain their former jobs was to strike. This was complicated by the fact that the local union had already completed an agreement with the management which provided for a definite line of progression from laborers to the top machine jobs. Since all of these top jobs were held by whites, there was little opportunity for blacks to regain their former positions. Finally on the night of February 25, 1944, the black workmen refused to work, claiming that they were denied promotions and were actually being passed over by whites with less seniority. (#13)

The growth and development of the AFL and the CIO are representative of another institution, the labor union, which further aided in denying blacks equal employment and which crowded them into less desirable jobs. Along with the rise

of unionism, the actions of management also discriminated against black workers. A look at management's actions follows.

PRACTICES OF MANAGEMENT

The economic thought of laissez-faire rationalized management's actions in discriminating against blacks in employment. This thought dominated in the late 1800s and the early 1900s. According to this type of thinking the market should be free to do its "own thing" without any involvement on the part of the government into the employer-employee relationship. If the government did interfere, it would destroy the "free enterprise" system that existed in the United States. The government should, therefore, maintain a "hands off" policy.

During this time frame employers were free to do as they pleased without any government regulation. An employer was free to establish the terms and conditions of employment. He could discriminate for good reasons, bad reasons, or no reasons. The employer was the master, and the law did not interfere. This property right of the freedom of contract was protected by the Fifth Amendment. Since employers had no restraints placed on their actions, they were able to exclude blacks from higher level jobs without the threat of government punishment or regulation.

After 1865 slavery was abolished, but the stereotypes still prevailed. The law may have erased the institution of slavery, but the stereotypes still existed long after Emancipation. Slavery created the image of the black as an "inferior" person. Slaves were looked upon as being "childlike, irresponsible, incapable of thought or foresight, lazy, ignorant, totally



dependent upon his master, and happy." (#16, p. 5) The decision to segregate blacks in the marketplace was often times based on this prejudice that many whites held against blacks. And since there was no government regulation, employers were free to do whatever they wished to do.

The many stereotypes about black workers influenced the hiring decisions of many employers. A common management view of black workers was:

"Negroes, basically and as a group, with only rare exceptions, are not as well trained for higher skills and jobs as whites. They appear to be excellent for work, usually unskilled, that requires stamina and brawn - and little else. They are unreliable and cannot adjust to the demands of a factory." (#15, p. 114)

According to a study by the Connecticut Commission on Civil Rights in the 1950s, management explained why blacks did not hold skilled positions: Blacks were not "by nature" suited for skilled work and were better suited for heavy, unskilled jobs; blacks did not apply for skilled jobs; and blacks did not possess the skills to do the skilled jobs. (#15, p. 115)

Another study in San Francisco in the 1950s was given the following reasons why employers did not hire and upgrade blacks: tradition, the belief that blacks were bad credit risks and got involved in heavy debts. About one-third of the employers mentioned physical, mental, or social traits that disqualified blacks for certain jobs. A few statements made were: "not intelligent enough to hold higher jobs," "not put in executive training positions because we don't expect them to be and they don't expect to get to be top management," and . . . they don't

want the responsibility." (#15, p. 116) A major conclusion of this study was that employers who had hired Negroes seemed less prejudiced than those who had not but that there "appeared to be a consensus among some employers that nonwhites lacked motivation for advancement to higher supervisory positions." (#15, p. 116)

According to the results of studies done by the Urban League in New Orleans and by the New York State Commission Against Discrimination, blacks have been preferred over whites for certain kinds of jobs or because of attributes they presumably possessed. When economic conditions improve, whites usually leave lower skilled jobs, so management has hired black workers for these positions because they are more dependable since their alternatives are limited. Also, many managers believe that blacks are better suited for work requiring great strength and which is very hot and disagreeable. (#15, p. 117)

In addition to the stereotypes that management held about black workers there were other factors which influenced their hiring decisions. The presence of a labor union often times placed many restriction on the actions of management. For example, labor-management agreements many times stated that to be eligible for employment an applicant must have gone through an apprenticeship training program. Since many unions refused to admit blacks into these union-controlled programs, there were few blacks who met this requirement.

Unions often included many qualifications that were not

necessary to perform the job, but which successfully kept black workers out. An educational requirement was one such qualification. Labor-management agreements often times stipulated that an applicant must have received a high school diploma. Since a larger percentage of whites than blacks finish high school, the effect of this was that blacks were discriminated against in employment.

Even if blacks were hired they were not always treated the same as other workers. In many union contracts with employers, agreements were based on race. Job assignment, promotion, furlough and dismissal were determined by the race of the employee and not on his job performance. Many times separate seniority lines were set up which, once again, were based on race. Since blacks were usually hired into the unskilled, lower paying jobs and they were barred from skilled jobs they never had the opportunity to break out of these unskilled jobs.

These are but a few examples that could be cited which demonstrate the influence that labor unions had on the employment decisions of management. Management was not always as free to do as it pleased; it often times had to base its decisions on the demands of the labor unions.

It has been shown that the institutions discussed above placed blacks in an inferior market position. Up until the 1930s there was very little government involvement in bettering their position in the marketplace. The enactment of the National Labor Relations Act of 1935 marked a major turning point

in the government's stand on such an issue. Although the act does not deal directly with employment discrimination the development of its interpretation did include discrimination.

THE DEVELOPMENT OF ANTI-DISCRIMINATION LAWS

As was discussed earlier, up until the 1930s employers were free to hire and fire according to any criteria including race. It was not until during the Depression that limits were placed on the actions of employers against labor unions. The National Labor Relations Act of 1935 was the first major law that limited the employers' freedom of action. The purpose of the act, as amended by the Taft-Hartley Act of 1947, was "to define and protect the rights of employees and employers, to encourage collective bargaining, and to eliminate certain practices on the part of labor and management that are harmful to the general welfare." (#20, p. 1) The two major goals of this act were "to protect the workers in their organizational efforts and union activity, and to provide for peaceful resolution of industrial disputes through collective bargaining." (#22, p. 9)

The first goal of the NLRA is spelled out in Sections 7 and 8 of the act. Section 7 gives employees the "right to self organization" and "to engage in concerted activities for mutual aid or protection." (#22, p. 10) Section 8(a)(1) goes on to make it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of. . . ." (#20, p. 2) those rights listed in Section 7.

Also Section 8(a)(3) makes it unfair for an employer to discriminate against employees "in regard to hire or tenure of employment or any term or condition of employment for the purpose of encouraging or discouraging membership in a labor

organization." (#20, p. 18) In general, it is illegal for an employer to discriminate in employment because of an employee's union activity. Discrimination here includes such employer actions as refusing to hire, discharging, demoting, assigning to a less desirable shift or job, or withholding benefits from an employee because of that employees union related activities.

These are basically the two main objectives of the NLRA. In effect, this law encouraged collective bargaining by organized labor. Since most blacks, at that time, were excluded from unions or limited to segregated locals, the white majority was able to elect and control the union. Blacks were unable to change the racial practices and they were denied equal representation in the bargaining process.

In fact, it can be argued that the NLRA gave the labor unions the power that they needed to enforce discriminatory labor practices. The NLRA did not provide for the protection of minority interest, nor did it prohibit racial discrimination in employment and finally it did not require labor unions to represent its members fairly in bargaining.

There was much controversy surrounding the passage of the NLRA. Black interest groups opposed its passage because of Section 7(a) which established the labor unions as the exclusive bargaining agents. Since most unions either excluded blacks from union membership and thus from union jobs, or engaged in other discriminatory practices, blacks were not equally represented by these unions. W. E. DuBois, a black spokesman, opposed the passage of the NLRA because its passage legitimized

the powers that such discriminatory unions, such as the AFL, held over black workers. According to him:

"The American Federation of Labor is not a labor movement. It is a monopoly of skilled laborers, who joined the capitalists in exploiting the masses of labor... the AFL has from the beginning of its organization stood up and lied brazenly about its attitude toward Negro labor... They have affirmed and still affirm that they wish to organize Negro labor when this is a flat and proven falsehood." (#13, p. 102)

Many attempts were made to safeguard the rights of black workers. A strong campaign was launched for the inclusion of an anti-discrimination amendment. However, due to the pressure that the AFL exerted on the sponsor of the bill, Senator Wagner, he dropped this clause to ensure that his bill would be passed instead of being thrown out.

With the passage of the NLRA, federal legislation gave unions unrestricted power in negotiating on behalf of all employees under their jurisdiction as well as legitimizing the powers that these unions held over black workers. The NLRB, which was set up to ensure the enactment of the NLRA, did not use its power to end the discriminatory practices that faced many black workers though. The only recourse that blacks had against discrimination was the courts. The development of the courts interpretation of the NLRA gave blacks their first means of gaining justice against the discrimination they faced in employment.

The first major decision involving employment discrimination was in the 1944 Supreme Court case Steele v. Louisville

— & Nashville R.R. Co. A union had negotiated a contract with the employer that led to the advancement of whites and the discharge of blacks. The courts ruled that it was the duty of the collective bargaining unit to represent members and nonmembers alike fairly and without discrimination. Since the certified collective bargaining agent was the "exclusive representative" of the unit it had the implied duty to fairly represent all the members of that unit. Steele v. Louisville was the first of a series of court cases which used the duty of fair representation as a means of redress against racial discrimination in employment.

— It is interesting to note that the Court's interpretation was narrow in scope. The Court's required the union, in collective bargaining, to negotiate equally on the behalf of blacks, but the union still could exclude blacks from membership into the union. Here the duty of fair representation was only imposed in the negotiation of collective bargaining agreements. "Unions were required in the abstract to bargain fairly on behalf of other Negro members or nonmembers, but the duty did not extend to other forms of racial discrimination in employment." (#13, p. 112)

— The Court's interpretation broadened the duty of fair representation in the 1952 case, Brotherhood of Railroad Trainmen v. Howard. (#19, p. 31) The Brotherhood which represented white brakeman, had negotiated a contract with the railroad to take over the jobs of train porters. The train porters were blacks and they were represented by another union. According to the Brotherhood, they owed no duty to the black porters be-



cause the porters were members of another union and were not within their jurisdiction. The Supreme Court said: "Bargaining agents who enjoy the advantage of the Railway Labor Act's provisions must exercise their trust without lawless invasion of the rights of other workers." (#19, p. 31) The union's obligation to workers was extended to include not only the union members, but workers who were not members of the union, and those who did not work under the union's jurisdiction.

The duty of fair representation was extended beyond the bargaining process in Conley v. Gibson (1958) (#13, p. 116) The company had purported to abolish forty-five jobs held by black workers who were discharged or demoted; instead these jobs were given to white workers. When the black workers complained, the union refused to process their grievance. The Supreme Court ruled that the union's failure to process the black workers' grievances could be argued under the duty of fair representation. This case was significant in that the unions duty of fair representation was no longer limited to the bargaining process, but extended to other areas of employment.

At the same time that the duty of fair representation was evolving in the courts, the NLRB was taking a very neutral position in aiding workers subjected to racial discrimination. It was not until Hughes Tool Co. v. National Labor Relations Board that the board adopted a policy to protect the rights of black workers. The NLRB held that the refusal of a union to process a worker's grievance because of race was an unfair

labor practice subject to established remedy. "For the first time in its history it ruled that discrimination by labor unions is an unfair labor practice; that racial discrimination by a union in membership practices - such as exclusion or segregation of Negroes - is a violation of the duty of fair representation under Section 9(a) of the NLRA." (#13, p. 132)

The board's decision stated that the discriminatory practices of labor unions in whatever form were unfair labor practices. The board also stated that if unfair labor practices were found to exist, that it would correct such practices by decertification, injunction, back-pay orders and other remedies. Up until then the NLRB had always aided unions in preserving the practices of racial discrimination. In the Hughes case, the board did an about face by adopting an affirmative position that it had an obligation to halt racial discrimination by labor unions. For the first time black workers had a means of redress against employment discrimination, at government expense. No longer was it necessary for blacks to go to the courts.

All the previous cases discussed dealt with unfair labor practices and breaches of the duty of fair representation by unions. Farmers' Cooperative Compress (United Packinghouse Workers) (#22, p. 29) dealt with the discriminatory racial practices of an employer. Unlike the unions, employers did not have an implied duty to represent all employees. Under the NLRA, employers could discriminate against employees as

long as their actions did not interfere with the Section 7 rights to engage in "concerted activities" for "mutual aid or protection." (#22, p. 29) In this case the Court ruled that discrimination based on race interfered with the collective organizational right of workers. The Court reasoned:

"Racial discrimination sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act; and racial discrimination creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of discrimination." (#22, p. 22)

The development of the Court's and the NLRB's interpretation of the NLRA as it dealt with racial discrimination is representative of the growing concern over discrimination in employment which evolved in the United States. From the narrow interpretation of fair representation by unions to the inclusion of employers, this development has been interesting. During this same time period other acts and state laws dealt with racial discrimination. For our purposes here, discussion can be limited to the NLRA for it is representative of other laws which dealt with this issue.

Prior to the passage of the Civil Rights Act of 1964 all of the cases dealing with employment discrimination were on an individual basis. Relief was given to individual plaintiffs. The Courts did not deal with the broad patterns of discrimination that existed. These patterns were the result of the long-established practices that existed in the United States and which were discussed earlier in this paper.

Samuel C. Jackson, a former EEOC commissioner, evaluated pre-Title VII handling of employment discrimination when he said:

"Looking back at efforts aimed at employment discrimination antedating Title VII, one perceives that they were, by and large, ineffective, not because the law lacked strength, but because of the failure of the administrator and the courts to see the shape of the target. Enforcement focused on individual acts of discrimination and failed to perceive that a specific act of discrimination was often embedded into the institutions of an employment relationship such as the collective bargaining agreement. . . one might say prior to the enactment of Title VII, compliance activity was concerned with the wrong done the complainant - an issue of no slight importance - to the virtual exclusion of the subject matter of the dispute - the practice of employment discrimination." (#13, p. 44)

During the two decades that preceeded the Civil Rights Act of 1964 the only recourses available against employment discrimination were the "duty of fair representation," and some executive orders, and some state employment practice laws. These means were very limited in scope.

In the 1960s a strong nationwide protest movement brought attention to the grievances of black Americans. Besides other civil rights demands, blacks demanded an end to racial discrimination in employment.

In response, the Congress passed the Civil Rights Act of 1964. The passage of this act was representative of the government's departure from its haphazard attempts to end employment discrimination towards a strong, national commitment toward achieving this goal. Specifically dealing with employ-

ment was Title VII, which was amended in 1972 by the Equal Employment Opportunity Act.

Title VII outlawed the following employment practices if based on grounds of race, color, religion, sex, or national origin:

- 1) Failure or refusal to hire or fire any person, or discrimination against him with respect to pay or terms and conditions of employment; or in the case of an employment agency or hiring hall, failure or refusal to refer a worker.
- 2) Segregation, classification, or any limitation of an employee in a way that would deprive him of equal employment opportunities.
- 3) Exclusion or expulsion from union membership.
- 4) Segregation, classification or limitation in union membership or failure or refusal to refer for employment.
- 5) A union's causing or attempting to cause an employer to discriminate against a worker.
- 6) Discrimination in any apprenticeship or training program.
- 7) Discrimination against employees or applicants for employment because they have challenged employment practices outlawed by this section.
- 8) Printing or publishing job notices indicating preferences because of race, sex, or national origin unless there are bona fide job qualifications.  
(#6, p. 340)

Title VII covers the employment practices of employers with more than fifteen employees, employment agencies serving employees covered under the Act, and labor organizations with fifteen or more members.

The Equal Employment Opportunity Commission (EEOC) was established to administer Title VII. It is an independent agency whose five members are appointed by the President,

with the approval of the Senate. Although it has no direct enforcement powers, its functions consist of investigation, persuasion, conciliation, and initiation of lawsuits in the federal courts.

The objective of Congress in the enactment of Title VII was to achieve equality in employment opportunities and to remove the barriers that have existed in the past which favored one group over another - whites over blacks. Under the Act, "practices, procedures or tests neutral on their face, and even neutral of intent, cannot be maintained if they operate to 'freeze' the statue quo of prior discriminatory practices." (#23, p. 19)

Since the enactment of Title VII most of the court cases dealing with employment discrimination have attacked the "inherently discriminatory practices of employment systems." (#13, p. 62) The courts have focused on the consequences of past discrimination that have become a part of our present day employment practices such as separate seniority lines. The focus has been on the structure of the discriminatory practices and not just the individual cases.

The Supreme Court's 1971 decision in Griggs v. Duke Power Company has been the most influential in its effects on American employment. Prior to the passage of the Civil Rights Act, the Duke Power Company had only employed blacks in the labor department, where the jobs were lower paying than any of the jobs in the other four departments, all of which were staffed by whites. These four departments were coal handling

operations, maintenance, laboratory, and test.

In 1955 the company had instituted a policy of requiring a high school diploma for assignment to any department except the labor department. In response to Title VII in 1965, the company no longer restricted blacks to the labor department but it required that a worker have a high school diploma to be transferred to another department. In 1965 the company added a further requirement for new employees. To be placed in any department (excluding the labor department) a prospective employee had to score above the median score on the Bennett Mechanical Aptitude Test and the Wonderlic Personnel Test.

Then, in 1965, the company began to permit those employees who did not hold a high school diploma to qualify for transfer from the labor department to another department by passing these two test. Neither test measured the ability to learn to perform any job. The passing scores that the company established were so high that only half of all the high school graduates in the United States would be able to pass it.

According to statistics in South Carolina only 34 percent of white males there had completed high school as compared to 12 percent of black males. There was also evidence that the passing rate of whites on the tests was far better than that for blacks. Because of society-wide discrimination against blacks, in this case education, the imposition of these job requirements was equal to race discrimination. The Court in its decision stated:

"What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. (#21, p. 53)

Regardless of the employer's intent, such "barriers" could only be allowed if they were essential:

"The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used." (#21, p. 53)

The most significant part of the Griggs decision was:

"But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." (#21, p. 53)

Title VII, interpreted in the Griggs decision had sweeping implications on the personnel policies and practices of a company. It was not enough for companies to avoid intentional discrimination. The Supreme Court ruled that it was the result of employment standards and practices that determined whether they were discriminatory. According to the Court, the only justification for it was "business necessity."

If a company could not justify an action by "business



necessity" it was forced to change them. No longer was a company as free to set up its own policies and practices. Not only did Title VII restrict a company's actions, but it placed further demands upon the company. Before Griggs it was assumed that a company could move toward equal employment opportunity at their own speed as long as the company showed some progress. The Griggs decision stated that a company must take swift action to remove discrimination unless it was related to "business necessity."

The significance of the Griggs case and other cases decided under Title VII was that for the first time the federal courts were confronting the structure of discriminatory practices instead of dealing with individual cases. The trend was toward a strong national commitment to getting rid of barriers to equal employment.

The issuance of Executive Order 11246 by President Johnson in 1965 went one step further than Title VII. Executive Order 11246 or as it is more commonly known, Affirmative Action, stated that, except under special circumstances in the national interest, all government contracts would include provisions that:

"The contractor will not discriminate against an employee or applicants for employment because of race, color, religion, sex,\* or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex,\* or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or re-

cruitment advertising; layoff or termination; rates of pay or other forms of compensation and selection for training, including apprenticeship.  
(#23, p. 9)

\*Added by Executive Order 11375

The purpose of Executive Order 11246 is to get companies to go beyond the passive policies of nondiscrimination and to take affirmative attempts to get rid of discrimination. The requirements are similar to Title VII but employers must, in addition, make affirmative attempts such as posting special notices and indicating in any help-wanted ads that they are equal opportunity employers. The penalties for noncompliance with the Order include adverse publicity and possible loss of government business in addition to all of the penalties available under Title VII.

Additional guideline have been issued since 1965 and now compliance with this Order extends to all contractors who do business of \$10,000 or more with the federal government. A contractor's responsibility varies with the amount of the contract. If a contractor does only \$10,000 worth of business, he is bound by Department of Labor regulation (The Office of Federal Contract Compliance Programs of the Department of Labor enforces this Order), but does not have to submit an affirmative action program. An affirmative action is required from every contractor with a \$50,000 or more contract. This order is very widespread in application since the vast majority of businesses do have contracts with the government. This directive even applies to those businesses who deal indirectly

with the government, i.e., subcontractors.

In preparing an Affirmative Action program an employer must conduct an underutilization study of the surrounding recruitment area to determine the minority population. Next the employer compares the percentage of minorities in that area to the percentage of minorities working in specific job classification in the company. To overcome the discrepancy that may occur each program must include specific goals, timetables, and courses of action for promptly achieving full and equal employment opportunity.

Employers are free to set their own goals and timetable but the OFCCP reserves the right to criticize either insufficient objectives or results. In adopting such a program, employers are not adopting quota systems. The purpose of the program is for employers to make an honest, concerted effort to hire minorities. If employers do make a valid attempt at meeting their goals but fail to reach them, the OFCCP will not punish them. The main purpose of affirmative action is to deal with the institutionalized effects of past discriminatory practices, such as those discussed earlier in this paper.

The Allen-Bradley Case which took place in 1968 is a good example of a company being cited for failure to comply with Executive Order 11246. The Allen-Bradley Company was charged with not affirmatively seeking out and recruiting Negroes for its work force.

Based on what it regarded as sound business reasons, Allen-Bradley preferred to hire people who were referred by its

present employees. The company almost never engaged in any public recruiting for its entry-level job openings. Since most of its present employees were white, so were all of its referrals; few blacks applied for jobs.

A hearing panel, appointed by the Secretary of Labor, ruled that the Allen-Bradley Company had failed to take affirmative action to broaden its recruitment base and to increase the flow of minority applicants. The company, however, insisted that it did not discriminate against any applicant for employment because of race or color. The panel agreed, but pointed out that discrimination was not charged. In finding the company in violation of Executive Order 11246, the Secretary of Labor stated:

"Affirmative action means, on these facts, the Company taking these steps with respect to its own recruitment and hiring practices which will make clear to those seeking work in Milwaukee that race, creed, color, and national origin make no difference when somebody applies for work at Allen-Bradley." (#23, p. 12)

Even though the Allen-Bradley Company had not been actively discriminating against blacks, the accepted personnel practice of recruiting through the present work force had the effect of perpetuating job discrimination. The purpose of Executive Order 11246 was for employers, like Allen-Bradley, to take affirmative attempts at getting rid of institutionalized practices of discrimination.

Executive Order 11246 is the next step in the governments attempt to break down the social institutions that have perpetuated discrimination in employment. Continued committment

to this is needed. It is not enough for employers to merely provide equal employment opportunities for blacks. Employers must take affirmative attempts to break down the institutional barriers that have barred blacks from equal employment opportunities in order for them to achieve equality in the marketplace.

## CONCLUSION

It has been shown how slavery, certain practices of labor unions and management all led to the inferior labor market status of blacks. Overcoming this status and gaining equality in employment is no easy task. The barriers that have existed in the past cannot be easily broken down.

In order for blacks to achieve equal employment opportunities, there must be a strong national commitment to "anti-discrimination" legislation. The development of the laws and executive orders in the last 50 years is representative of our nation's growing concern for the plight of blacks.

The 1960s represented the height of the nation's concern for this problem. The Civil Rights Act of 1964 and Executive Order 11246 were the result of this concern. Combined together they represent the most powerful and effective means of breaking down the barriers that have existed in barring blacks from an equal status in the marketplace. Continued enforcement of both is necessary to achieve equal employment opportunities in the United States.

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